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October 16, 2003

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, D.C. 20054

Re: Comments of EchoStar Satellite Corporation
Docket No. 03-206

Dear Ms. Dortch:

Transmitted herewith on behalf of EchoStar Satellite Corporation is a copy of its "Comments of EchoStar Satellite Corporation" in connection with Docket No. MB 03-206.

Additional copies of the pleading are also being delivered, either by email or by U.S. first-class mail, to each of those listed on the attached Certificate of Service.

If there are any questions concerning this matter, kindly communicate directly with this office.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James E. Dunstan".

James E. Dunstan

JED:cll
Enclosure

Before The
Federal Communications Commission
Washington, D.C. 20554

In the matter of:)	
)	
Exclusivity Agreements Affecting)	Docket No. MB 03-206
Direct Broadcast Satellite (DBS))	
Providers)	
)	
Request for Section 403 Inquiry)	
To:		The Commission

Comments of EchoStar Satellite Corporation

EchoStar Satellite Corporation ("EchoStar"), by its attorneys, and pursuant to Sections 1.1200(a) and 1.1206 of the FCC's rules, 47 C.F.R. Sec. 1.1200(a) & 1.1206, hereby files these Comments in response to the "Request for Section 403 Inquiry and for Declaratory Ruling" ("Request") filed by Word of God Fellowship, Inc. d/b/a Daystar Television Network ("Daystar") on August 19, 2003, and the Opposition filed by Dominion Video Satellite, Inc. ("Dominion"), on September 2, 2003.¹

I. INTRODUCTION AND FACTUAL BACKGROUND

EchoStar is caught in the middle of a power struggle between two Christian broadcast entities each of whom wishes to maximize its reach and leverage in delivering Christian educational programming to DBS customers. On one side is Dominion, which has sought through court litigation to eliminate an entire class of educational programming EchoStar may provide to its subscribers, and on the other is Daystar, which

¹ By Public Notice, DA 03-2884, 18 FCC Rcd. 18689 (2003), the Commission assigned Docket No. 03-206 to Daystar's request, and set October 16, 2003, as the date on which comments should be filed. These comments therefore are timely filed.

now seeks to invalidate an agreement between EchoStar and Dominion (hereinafter “the EchoStar/Dominion Agreement”).

As pointed out by Dominion, EchoStar was ordered by a Federal District Court judge in Colorado to bring down the Daystar national programming feed as being in violation of the 1996 EchoStar/Dominion Agreement, which granted Dominion the exclusive right to distribute Christian programming to EchoStar’s subscribers.² The Tenth Circuit has stayed that preliminary injunction pending EchoStar’s appeal of that order, and as of the date of these comments, EchoStar continues to carry both Daystar and Familynet as Public Interest programming. In response to the preliminary injunction, Daystar filed the instant Request, asking the FCC to preempt the 1996 EchoStar/Dominion Agreement, based on the claim that such exclusive agreements restrict access for Public Interest programmers, and could lead to a situation where DBS providers were unable to meet the Section 335(b) set-aside of four percent (4%).³

In response to Daystar’s Request, Dominion has filed an Opposition arguing that the FCC has no jurisdiction to review or interpret the EchoStar/Dominion agreement.⁴ In addition, Dominion has raised several issues related to Daystar, and the agreement between EchoStar and Daystar (hereinafter “the EchoStar/Daystar Agreement”). Dominion first claims that Daystar is not qualified to provide Public Interest programming.⁵ Dominion further claims that the EchoStar/Daystar Agreement violates

² See Dominion Opposition, pp. 4-5.

³ See Daystar Request, pp. 5-6.

⁴ See Dominion Opposition, pp. 5-7.

⁵ See Dominion Opposition, pp. 10-13.

Section 25.701(c)(5), which limits the ability of a DBS provider to charge a Public Interest programmer more than 50% of the actual cost of delivering the programming.⁶

The net result is that EchoStar is caught in the crossfire between two organizations that while professing as their mission the wide dissemination of the Gospel, in fact have chosen courses designed solely to maximize the dissemination of their own particular programming.

II. COMMENTS

A. Allowing Dominion to Exercise the Exclusivity Provisions of the EchoStar/Dominion Agreement May Well Result in EchoStar's Inability to Meet the 4 Percent Public Interest Programming Requirement of Section 335

In its Request, Daystar points out that in civil litigation between Dominion and EchoStar, EchoStar has testified as to the difficulty of finding qualified educational programmers to fill the 4 percent set-aside.⁷ Further, EchoStar has testified that its experience has been that the most stable source of educational programming comes from Christian educational programmers.

As of December 31, 2002, EchoStar had received ten (10) applications for access on its reserved public interest channels from the following entities:

- | | |
|--|-------------------------------|
| 1) Clara Vision; | 2) Daystar; |
| 3) FamilyNet; | 4) Health TV Channel; |
| 5) Inspirational Network; | 6) Prophetic Word Ministries; |
| 7) Shepherd's Chapel; | 8) Tomorrow's Planet; |
| 9) Universal Education Foundation; and | 10) The Word Network |

Of these applicants, only Health TV, Universal Educational Foundation, and Tomorrow's Planet could not be challenged by Dominion as not having predominantly

⁶ See Dominion Opposition, pp. 13-16.

⁷ Daystar request, p. 5, *citing pleading filed in Dominion Video Satellite, Inc. v. EchoStar Satellite Corporation, et al and Word of God Fellowship Incorporated*, U.S. Court of Appeals for the Tenth Circuit, Case Nos. 03-1274, 03-1303.

Christian programming. EchoStar initially rejected Health TV because of EchoStar's conclusion that Health TV lacked adequate funding to both develop programming and pay the monthly access fee allowable under FCC rules. Health TV has since confirmed these fears, and is delinquent in its payments to EchoStar under Section 25.701(c)(5). Further Health TV's programming is essentially duplicative, requiring EchoStar to manually feed tapes at its Uplink Center. EchoStar rejected Tomorrow's Planet because in doing its due diligence, EchoStar discovered that Tomorrow's Planet was nothing more than a concept which lacked any programming or the technical support to deliver that programming to EchoStar's Uplink Center. Finally, EchoStar rejected the Universal Education Foundation because the programmer could not provide proof of its 501(c)(3) non-profit status, nor did it provide a budget proposal.⁸

EchoStar further testified in the Colorado Federal District Court action as to numerous instances where non-Christian educational programmers simply could not qualify for carriage because of a lack of financing to even pay the 50 percent of actual cost fees EchoStar is allowed to impose.⁹ In short, there is a severe shortage of non-

⁸ Dominion argued before the Colorado Court that EchoStar should have accepted the proposal of Universal Education Foundation, even in the face of a significant question as to whether they qualified as a national educational program provider pursuant to the definition set forth in Section 25.701(c)(2) of the Commission's Rules. This position is quite interesting in the face of Dominion's current argument that EchoStar is precluded from carrying Daystar's programming pursuant to Section 335, because although Daystar is a qualified 501(c)(3) organization, its activities violate the prohibition against selling advertising by non-commercial licensees of the FCC. Dominion thus proposes an apparent double standard: non-Christian programmers may be carried regardless of their non-profit status, but Christian programmers must be scrutinized to the nth degree to determine whether every aspect of their organization complies with every aspect of FCC rules.

⁹ For example, the California Community College Satellite Network ("CCCSN") is a programmer that was offered capacity on EchoStar's reserved public interest channels. When CCCSN lost its funding, EchoStar waived its access fees for three (3) months to allow the channel to seek additional sponsorship. The channel was taken off the air (at CCCSN's request)

Christian educational programming that EchoStar can air pursuant to Section 335. If Dominion is allowed to enforce the exclusivity provisions of its agreement with EchoStar, entered into in 1996, prior to the establishment of the Public Interest rules, and certainly prior to the realization of the lack of qualified national educational programmers whose programming would not be subject to a challenge by Dominion that it is Christian-oriented, it is quite likely that EchoStar will not be able to fill the 4 percent set-aside specified in Section 335 and 25.100(c). Thus, if Dominion's position prevails, the result will be a net reduction in educational programming available to EchoStar's subscribers.

B. A Finding that Daystar is Not a Qualified Educational Programmer Would Call Into Question the Validity of the EchoStar/Daystar Agreement

In the Colorado litigation, EchoStar supported Daystar's claims that it is a qualified national educational programming provider under Section 335(b)(3).¹⁰ This was based largely on representations Daystar made to EchoStar when Daystar entered into the EchoStar/Daystar Agreement. Should the Commission nevertheless conclude that Daystar does not qualify as an educational programmer under Section 335(b)(3), and 25.100(c)(2), then the Commission should render a specific finding to this effect,¹¹

because, as disclosed to EchoStar, CCCSN was unable to secure funding. Further, RFD-TV is currently offered as one of EchoStar's reserved public interest channels. Initially, RFD-TV did not have adequate funding and offered nothing other than duplicative programming. For one year, EchoStar subsidized this channel and paid an employee to feed tapes to its Uplink center. Finally CoLours TV Network is another public interest applicant that was afforded channel capacity but had difficulty providing programming.

¹⁰ 47 U.S.C. § 335(b)(3). See also *Implementation of Section 25 of the Cable Television Act: Direct Broadcast Public Interest Obligations* ("DBS Public Interest Programming Report & Order"), 13 FCC Rcd. 23254 (1998), ¶¶ 76-90 (discussing definition of "national educational programming supplier" under Section 335(b)(3)).

¹¹ The issue of whether Daystar qualifies as an educational programmer within the meaning of Section 335(b)(3) is a regulatory issue, and not a contractual one. The Commission certainly is free to make such a determination, as was contemplated by the *DBS Public Interest Programming Report & Order*, ¶ 86 (the FCC will consider the issue of whether an entity

whereupon EchoStar could then decide whether to void the EchoStar/Daystar Agreement because a fundamental representation and warranty of Daystar had proven false.

C. The FCC May Not Refrain from Interpreting the EchoStar/Dominion Agreement, But Also Interpret the EchoStar/Daystar Agreement

In an amazing case of speaking out of both sides of its mouth, Dominion forcefully argues when it comes to the EchoStar/Dominion Agreement that the Commission lacks jurisdiction to step in and preempt this private contract under Section 335(b).¹² Yet barely seven pages later, Dominion turns around and argues that the FCC should step in and void the EchoStar/Daystar Agreement, as being in violation of the same provision, a complete turnaround.¹³ Dominion provides no justification for the FCC remaining on the sidelines when a contractual provision favors its private economic interests, but intervening to interpret a contract which might lessen the hammerlock Dominion has over Christian educational programming delivered to EchoStar subscribers. Dominion can not have it both ways. If either of these agreements is subject to review by the FCC, then both are.

D. Daystar's Agreement to Waive its Must Carry Rights for Local-into-Local Stations Does Not Violate Section 25.701(c)(5)

Finally, EchoStar is compelled to take a firm stand and file specific comments in opposition to Dominion's request that the FCC declare the EchoStar/Daystar Agreement

qualifies as a "national educational programming supplier" on a "case-by-case" basis). If the Commission makes such a finding, which contradicts Daystar's representation in the EchoStar/Daystar Agreement, then the fundamental basis of the contract itself would be so undercut as to make the Agreement as a whole void *ab initio*.

¹² See Dominion Opposition, pp. 6-7.

¹³ See Dominion Opposition, pp. 13-16.

void because it violates the FCC rule¹⁴ which limits the amount a DBS provider can charge a national educational programmer to only 50 percent of the actual cost of delivering the signal.¹⁵ Dominion argues that because Daystar has agreed to waive the must carry rights of its stations that carry the nearly identical programming as the Daystar national feed in markets where those stations operates, that this somehow constitutes an “exchange of excess compensation.”¹⁶

The *DBS Public Interest Programming Report & Order* vests tremendous discretion in EchoStar to determine what programming it will provide to fulfill its obligations under Section 335(b).¹⁷ The only limitations are that a DBS can not “auction off” the four percent set aside by charging programmers more than 50 percent of the actual cost of delivering the signal. The Commission should therefore conclude that EchoStar was within its rights to choose Daystar’s programming.

¹⁴ Dominion cites this rule as being Section 73.701(c)(5). See Dominion Opposition, p. 13. Section 73.701 deals with international broadcast stations, and there is no subsection (5). EchoStar assumes that the rule Dominion claims EchoStar is violating is Section 25.701(c)(5) (formerly 100.701(c)(5)).

¹⁵ See *DBS Public Interest Order*, ¶¶ 126-134.

¹⁶ See Dominion Opposition, pp. 13-16. The term “exchange of excess compensation” does not appear anywhere in either the statute or the rule, nor in the *DBS Public Interest Order*. It is, instead, Dominion’s shorthand way of trying to convert a non-economic factor into an alleged cost under Section 25.701(c)(5).

¹⁷ “Thus, we believe that DBS providers might permissibly consider a variety of factors in determining which programmers to select, including the broad genres of programming they plan to provide (e.g., cultural, documentary, children’s education), the programmers’ experience, reliability, and reputation for quality programming, and the quality of programming they may have produced in the past . . . We decline to establish at the present time a complicated regulatory structure that sets out specific and detailed rules addressing the particular conduct DBS providers can or cannot engage in while selecting programmers.” *DBS Public Interest Order*, ¶ 102. See also Dominion Opposition, p. 8 (quoting this same language, as it applies to the EchoStar/Dominion Agreement).

Section 25.701(c)(5) was enacted for one particular purpose – to ensure that DBS providers did not charge prices for the public interest set aside so high as to preclude qualified entities from participating. “If noncommercial educational and informational programmers are forced to share [expenses beyond 50% of actual delivery costs], the costs of leasing channels would keep many programmers out of the market, thus defeating Congress’ desire to make noncommercial programming readily available.”¹⁸ Beyond this limitation on the *direct expense charged*, however, the Commission left the other terms and conditions of carriage up to negotiations between DBS providers and national educational programming suppliers.¹⁹ The Commission concluded: “While we believe that DBS providers should consider such terms and conditions as they comply with the statutory requirement, we will follow a more flexible approach and not mandate such terms and conditions in our rules because this is consistent with our policy to avoid excessive regulatory involvement in programming arrangements.”²⁰

Dominion does not and cannot claim that EchoStar is actually charging Daystar an amount in excess of 50 percent of its actual delivery cost. Instead, Dominion claims that the Commission should interpret the EchoStar/Daystar Agreement so as to ascribe an

¹⁸ *DBS Public Interest Order*, ¶ 130.

¹⁹ *Id.*, ¶ 133 (“we agree with EchoStar that we should not be involved in setting rates for noncommercial programmers because we do not set rates for satellite capacity in any other context”).

²⁰ *Id.*, ¶ 134. Then-Commissioner Powell partially dissented to even this modest regulatory scheme, at least as it applied to limiting entities to a single channel. “This rule is over-regulatory and depends upon speculative conclusions that government intrusion is necessary to ensure diversity and variety on these channels. I see no basis for such a conclusion. Each of the DBS operators offering service today provides a wide variety of programming that runs the gamut from entertainment to news, information and instruction. These operators clearly have found that diversity in programming helps to gain subscribers – some seven million or so and growing. Given this dynamic in the industry, I see no reason to intrude.” *Id.* at 23317 (Powell, Commissioner, dissenting in part).

economic value to Daystar's decision to forego carriage of its local stations, and assign that as a "cost," that when added to the actual costs Daystar is reimbursing to EchoStar, constitutes a violation of Section 25.701(c)(5). Such an interpretation of Section 25.701(c)(5), goes far beyond the limitations set forth by the Commission in the *DBS Public Interest Programming Report & Order*. Indeed, it forces the Commission to do *exactly* what Dominion has elsewhere claimed it cannot – interpret the metes and bounds of a private contract. If the Commission were to intercede on Dominion's behalf here to determine the overall value of the EchoStar/Daystar deal, it will be equally compelled to review and opine as to the overall value of other DBS contracts with national educational programming suppliers. For example, a less successful program supplier could claim that the carriage of a more popular supplier's programming added to the overall value of a DBS provider's service – constitutes "excess compensation."²¹

Clearly, this is an endeavor the Commission must avoid. Instead, the Commission's analysis under Section 25.701(c)(5) is limited solely to determining whether the actual amount charged to a program supplier exceeds 50 percent of the actual

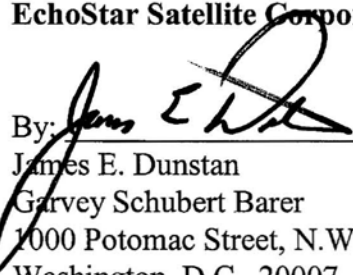
²¹ In an analogous situation, the FCC does not regulate the terms of cable/TV and DBS/TV retransmission consent agreements to determine whether they are fair, beyond establishing guidelines requiring entities to negotiate in good faith. *See, Implementation of SHVIA: Retransmission Consent Issues, Good Faith Negotiation and Exclusivity*, 15 FCC Rcd. 5445, ¶ 39 (2000) ("consistent with our determination that Congress intended that the Commission should enforce the process of good faith negotiation and that the substance of the agreement generally should be left to the market, we will not adopt the suggestions of certain commenters that we prohibit proposals of certain substantive terms, such as offering retransmission consent in exchange for the carriage of other programming such as a cable channel, another broadcast signal, or a broadcaster's digital signal"). The Commission took an even less regulatory approach in the *DBS Public Interest Order*, in rejecting a request to adopt rules further specifying the terms and conditions DBS operators could demand, in addition to setting the compensation rate. *DBS Public Interest Order*, ¶ 134 ("we will follow a more flexible approach and not mandate such terms and conditions in our rules because this is consistent with our policy to avoid excessive regulatory involvement in programming arrangements).

delivery cost, not whether the total value of the deal, considering all economic and non-economic factors, is somehow worth more than another deal which could be struck with some hypothetical other educational program provider.

III. CONCLUSION

EchoStar's goal in entering both the EchoStar/Dominion Agreement and the EchoStar/Daystar Agreement was to maximize its ability to deliver diverse programming to its subscribers and meet its obligations under Section 335(b). The apparent goal of both Dominion and Daystar, based on their actions here and elsewhere, is to use EchoStar to dominate the market for Christian educational programming. Neither EchoStar nor the FCC should be forced to support either Dominion or Daystar as they pursue their own economic agendas. The Commission should further resist Dominion's request to broaden the scope of Section 25.701(c)(5) to allow the FCC to ascribe value to non-economic terms of a carriage agreement.

Respectfully submitted,
EchoStar Satellite Corporation

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CERTIFICATE OF SERVICE


I, James E. Dunstan, hereby certify that on this 16th day of October, 2003, copies of the foregoing "Comments of EchoStar Satellite Corporation" have been served by U.S. first-class mail, postage prepaid, or by email, upon the following:

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